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MAT JIM WAHAB v. NAGASTEEL EQUIPMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[SUIT NO: 22NCC-470-12-2014]
B 8 MARCH 2018

CIVIL PROCEDURE: *Damages – Assessment of damages – Application for – Application for directions for assessment of damages pursuant to judgment obtained – Whether filed out of time – Whether exceeded one month period stipulated under* C *O. 37 r. 1(1) of Rules of Court 2012 – Whether requirement of O. 37 r. 1 mandatory and requires strict compliance*

This was the plaintiff's application for assessment of damages due and payable to him for wrongful termination of his contract of employment and/or his constructive dismissal by the defendants pursuant to the High D Court judgment on 15 January 2016. The defendants appealed against the High Court order and on 5 October 2016 the Court of Appeal upheld the decision and the order of the High Court. The plaintiff then filed an application, namely a 'Notis Minta Arahan' ('NMA') dated 26 September 2017 and prayed, amongst others, for damages to be assessed pursuant to the E High Court order. The defendants raised the issue of delay in the filing of the NMA by the plaintiff. The plaintiff, however, did not dispute the delay but argued that the delay had been explained and that the defendants themselves did not take any steps to have the damages assessed. It was, therefore, the plaintiff's contention that the defendants should be estopped from raising the F issue of delay and in any events the defendants had not shown that the delay in filing the NMA had caused any prejudice to them. The plaintiff further, amongst others, relied on O. 37 r. 1(3) of the Rules of Court 2012 ('ROC') and argued that the delay in filing the NMA was not fatal to the assessment process as the court may on the application of the party against whom the G judgment was given, proceed to assess damages or make such order as it thinks just. The issues that arose for determination, *inter alia*, was whether the plaintiff's NMA should be dismissed.

Held (dismissing plaintiff's application):

H **(1)** The plaintiff herein filed the NMA on 26 September 2017. The High Court order was dated 15 January 2016. By virtue of O. 37 r. 1 of the ROC, any application for assessment of damages shall be made within one month. In the present case, it should be on or before 15 February 2016. There was a tangible delay of one year and seven months on the part of the plaintiff in filing the NMA. The requirement of O. 37 r. 1 I of the ROC is mandatory and therefore it requires strict compliance and cannot be disregarded. The word 'shall' in O. 37 r. 1 of the ROC restrained the exercise of the discretion even under O. 3 r. 5 (1) of the ROC for the mandatory requirement under O. 37 r. 1 to be extended or abridged. (paras 12 & 13)

(2) The High Court's decision was upheld by the Court of Appeal on 5 October 2016, yet the plaintiff failed, and/or neglected and/or refused to file the NMA on/or before 5 November 2016 wherein there was another delay of 11 months. Again, the court could not be expected to give leeway to strict compliance with the mandatory rules solely on the ground that the plaintiff was waiting for determination of some settlement. (para 20)

(3) Order 37 r. 1(3) is independent and not subject to r. 1(1). Order 37 r. 1(3) cannot negate the mandatory obligation of the plaintiff who was entitled to the benefit of the judgment to file the application for the assessment of damages within one month from the date of the judgment. Unlike O. 37 r. 1(1), the word 'may' in O. 37 r. 1(3) does not make it mandatory for the court to assess the damages and on the defendants against whom the judgment was given to make the application. (para 22)

(4) The plaintiff's NMA ran contrary and in non-compliance to the mandatory provision of O. 37 r. 1 of the ROC. The NMA filed by the plaintiff was an abuse of court's process and premised on the delay issue alone, the plaintiff's NMA must be dismissed. (para 23)

Case(s) referred to:

Abdul Hamid Jaafar (trading as a sole proprietor as Bintang Enterprise) v. Shamsiah dan Keluarga Sdn Bhd [2004] 5 CLJ 381 HC ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] 1 LNS 156 FC ***(refd)***

JMB Silverpark Resort v. Silverpark Sdn Bhd & Anor [2015] 1 LNS 890 HC ***(refd)***

Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***

Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor [2014] 8 CLJ 876 CA ***(refd)***

Unilever (M) Holdings Sdn Bhd v. So Lai & Anor [2015] 3 CLJ 900 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 2
Rules of Court 2012, O. 2 r. 3, O. 3 r. 5(1), O. 37 r. 1(1), (3)
Rules of the Court of Appeal 1994, r. 18(4)(c)
Rules of the High Court 1980, O. 1A

For the plaintiff - Mahathir Abdullah; M/s Athi Seelan Mahathir & Partners
For the defendants - Ganesan Gunathan, Gomathy Balasupramaniam & Dominic (PIC); M/s Ganeson Gomathy & Partners

Reported by Sandra Gabriel

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JUDGMENT

Noorin Badaruddin J:

[1] This is the plaintiff's application for assessment of damages due and payable to him for his wrongful termination of his contract of employment and/or his constructive dismissal by the defendants pursuant to the High Court's judgment on 15 January 2016.

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[2] The High Court allowed the plaintiff's claim in para. 50(a) and (k) and decreed for damages to be assessed by the Deputy Registrar.

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[3] The defendants appealed against the High Court order and on 5 October 2016, the Court of Appeal upheld the decision and the order of the High Court.

[4] The plaintiff then filed a "notis minta arahan" ("NMA") dated 26 September 2017 and prayed amongst others, for damages to be assessed pursuant to the High Court order.

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The Contentions

[5] The defendants have raised the issue of delay in the filing of the NMA by the plaintiff. The plaintiff does not dispute the delay but argued that the delay has been explained and that the defendants themselves did not take any steps to have the damages assessed. It is the plaintiff's contention that the defendants should be estopped from raising the issue of delay and in any event, the defendants have not shown that the delay in filing the NMA has caused any prejudice to them.

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[6] The plaintiff relied on O. 37 r. 1(3) of the Rules of Court 2012 ("ROC") and argued that the delay in filing the NMA is not fatal to the assessment process as the court may on the application of the party against whom the judgment is given, proceed to assess damages or make such order as it thinks just. The plaintiff added that the rule provides avenue for the unsuccessful party to proceed with the assessment proceedings in circumstances where a delay in the assessment of proceedings may prejudice the unsuccessful party. According to the plaintiff, as the defendants being the unsuccessful party did not on their own accord initiate assessment proceedings, they ought to be estopped from raising the issue of delay against the plaintiff.

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[7] In citing the case of *Abdul Hamid Jaafar (trading as a sole proprietor as Bintang Enterprise) v. Shamsiah dan Keluarga Sdn Bhd* [2004] 5 CLJ 381; [2004] 5 MLJ 349 where the High Court expressed its' hope that "procedural technical objections would henceforth be consigned to oblivion for good", the plaintiff added that the defendants have not even alluded to a substantial miscarriage of justice or the occasioning of prejudice which would entitle them to raise a preliminary objection under O. 2 r. 3 of the ROC in the affidavits filed.

I

[8] In regards to the assessment of damages, the plaintiff argued that in view of the wrongful termination and/or constructive dismissal of the plaintiff from his employment, the plaintiff is entitled to damages for such wrongful termination and/or constructive dismissal, in the sum of RM313,200 being the equivalent of back wages amounting to 24 months' salary, which is entirely reasonable and being an accepted measure of damages in industrial law.

[9] The defendants on the other hand argued that there is no basis for the plaintiff to claim for 24 months' salary as the jurisdiction to award such salary as damages is only vested with the Industrial Court wherein it is a remedy *in lieu* of reinstatement. The defendants appear to be relying on the fact that the plaintiff has exceeded the applicable age of retirement of 55 years and is therefore disentitled from seeking damages for wrongful termination.

[10] The plaintiff submits that despite the fact that he has exceeded the retirement age of 55, he continued to be employed by the first defendant well past the age of 55. The plaintiff argued that as he reached 55 years of age in 2007 and was only wrongfully terminated in 2011, when he had already attained the age of 59, from a contractual point of view his retirement age was never a consideration for his continued employment with the first defendant. The plaintiff contends that the defendants are therefore estopped from denying his entitlement to damages.

Findings

[11] The rule governing application for assessment of damages is laid down in O. 37 r. 1 of the ROC which states as follows:

> Assessment of damages by Registrar (O. 37 r. 1)
>
> (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.
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> (2) On the hearing of the application for directions, the Registrar may, in addition to making such orders as are necessary and appropriate under Order 34, give directions as to the time by which a notice of appointment for assessment of damages shall be filed and such notice upon being filed shall, notwithstanding anything in Order 62, rule 10, be served not later than seven days thereafter on the party against whom the judgment is given. Notice of appointment for assessment of damages shall be in Form 62A. P.U. (A) 163
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> (3) If the party entitled to the benefit of the judgment fails to comply with paragraph (1), the Court may, on the application of the party against whom the judgment is given, proceed to assess damages or make such other order as it thinks just.

A (4) The attendance of witnesses and the production of documents before the Registrar in proceedings under this Order may be compelled by subpoena, and the provisions of Order 35 shall, with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at the trial.

B (5) Subject to any direction given by the Registrar pursuant to this rule, the party entitled to the benefit of the judgment shall file a notice of appointment for assessment of damages within six months of the date of judgment.

(6) A party shall not file a notice of appointment for assessment of damages by the Registrar pursuant to this rule unless directions for C filing and exchange of affidavit evidence pursuant to Order 34 have been given or complied with, as the case may be.

(7) If that party does not file the notice of appointment for assessment of damages within the prescribed period, any other party may apply for directions.

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[12] The plaintiff herein filed the NMA on 26 September 2017. The High Court order is dated 15 January 2016 and by virtue of O. 37 r. 1 of the ROC, any application for assessment of damages shall be made within one month. In the present case, it should be on or before 15 February 2016. Obviously and it is not disputed that there is a tangible delay of one year and seven E months on the part of the plaintiff in filing the NMA.

[13] The requirement of O. 37 r. 1 of the ROC is mandatory and therefore it requires strict compliance and cannot be disregarded. Mandatory requirement of the rules is not technical. There is no room for discretion as F discretionary power can only be exercised if the specific provision allows it. This court finds that the word 'shall' in O. 37 r. 1 of the ROC restrained the exercise of the discretion even under O. 3 r. 5(1) of the ROC for the mandatory requirement under O. 37 r. 1 to be extended or abridged.

[14] In *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309, the G Court of Appeal construed the word "shall" in r. 18(4)(c) of the Rules of the Court of Appeal 1994, to be obligatory and must be strictly complied with. The court stated as follows:

> [1] Rule 18(4)(c) of the RCA is mandatory. It clearly states that "The appellant shall attach to such memorandum copies of the proceedings in H the High Court, including, copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purpose of the appeal ..." The word "shall" in the rule means 'obligatory'. Hence the defendant ought to have included all the exhibits and documents produced before the High Court ...
>
> I [2] Whilst strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

[15] The Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 emphasised that technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. As in this present case, objections are also raised as to the plaintiff's application wherein the NMA is stated to be filed pursuant to O. 7 r. 1 of the ROC which rule is of non-existence. In addition, the certificate verifying the exhibits in the plaintiff's affidavit carries the wrong identity card number of the plaintiff. No corrective affidavit is filed by the plaintiff to rectify those mistakes. Nevertheless, those are in the considered view of this court accidental omission or oversight amounting to technical non-compliance on the part of the plaintiff.

[16] The Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail ibni Sultan Iskandar Al-Haj* (*supra*) further stated that a general provision such as O. 1A of the Rules of the High Court 1980 is for the court or judge to give heed to justice over technical non-compliance but it must not supersede a mandatory requirement of the Rules. The Federal Court reminded that general provision such as O. 1A of the Rules cannot be invoked when a party intentionally disregards in complying with the Rules and in the context of the Rules of the High Court 1980, the phrase "... technical non-compliance ..." is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature. The Federal Court stated as follows:

> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. O. 1A RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O. 1A RHC does not apply as the respondents had intentionally disregarded O. 6 r. 7(2A) RHC for their own reasons.
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> [47] It is now necessary to determine the meaning of the phrase "... technical non-compliance ... " in O. 1A RHC as it will assist in identifying the breaches contemplated by the rule. Useful guidance is provided by the meaning of the phrase "technical defect" considered in *Gangadhar Dandawate v. Premechand Kashyap* AIR [1958] MP 182 where AH Khan J said at p. 184:
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> > It is not always easy to define what the expression 'technical defect' means. A technical defect in law is one which may come within the four corners of it, but it does not affect the merits of the case. It is a mistake which does not go to the core of the matter. Their Lordships of the Supreme Court in *Pratap Singh v. Shrikrishna Gupta*, AIR [1956] SC 140 (C), have observed:
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> > > that the tendency of the Courts towards technicality is to be deprecated, that it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the

A root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which is which, judges must determine the matter, and, exercising a nice discrimination, sort out one class
B from the other along broad based, common sense lines. This principle was enunciated by Viscound Maugham in *Punjab Co-operative Bank Ltd, Amritsar v. Income-tax Officer, Lahore*, AIR [1940] PC 230 (D).

[48] In the context of the Rules of the High Court 1980 the phrase
C "... technical non-compliance ..." is thus a reference to noncompliance with a rule which is not fundamental or mandatory in nature.

[17] In this present case again, no application is made for any extension of time for the non-compliance of the mandatory requirement of the rules by the plaintiff. In fact, no averment is made at all in the plaintiff's supporting
D affidavit of the NMA to explain the delay. When the issue of delay is raised by the defendants in their affidavit in reply, all the plaintiff could offer as explanation to such delay is that he is desirous to settle the matter without having to go through the process of assessment. The plaintiff averred that it was not his intention to delay the matter since the damages ordered against
E the defendants is his only source of income since his dismissal from employment.

[18] It is of the considered view that the reasons given by the plaintiff as stated in the above are not cogent or reasonable. As stated earlier, the requirement under O. 37 r. 1(1) of the ROC is a mandatory statutory
F requirement and not discretionary. The reasons given by the plaintiff as to the delay cannot be categorised as 'technical defect' whatsoever. The conduct gleaned from the reasons given by the plaintiff implied an act which is not inadvertent and even that it is not a good ground for the discretion to be exercised in light of a mandatory requirement of the Rules. The plaintiff
G should have filed the NMA first and requests for adjournment of the assessment pending negotiations with the defendants. Discretion in granting adjournment can be exercised once the mandatory requirement is adhered to and not the other way round where the court is expected to wait for the mandatory application to be made pending some settlement which ultimately
H is not fruitful.

[19] The plaintiff argued that the defendants have not shown that they have been prejudiced by the delay in the filing of the NMA. However, this court shares the view given by the learned judge in *JMB Silverpark Resort v. Silverpark Sdn Bhd & Anor* [2015] 1 LNS 890 where Yeoh Wee Siam J (as Her Ladyship
I then was) stated that it is prejudicial to the defendants for the plaintiff to revive its claim for assessment of damages on a date which is long past the one month which is mandated by law. Her Ladyship stated as follows:

9. In the present case, the Plaintiff filed the Summons for Directions (enclosure 24) ("the Application") to the Registrar on 2.1.2014 ie, 1 year, 1 month and 14 days after the High Court Order.

10. The Plaintiff's explanation for the delay in filing the Application is that it is due to inadvertence. The Plaintiff, after the 1st Defendant had exhausted all the avenues of appeals regarding the High Court Order, then instructed its Solicitors to pursue the assessment of damages for trespass towards the end of December 2013. It was then that the Plaintiff realised that the provision of O. 37 of the ROC requires the Plaintiff to apply for directions from the Registrar within 1 month from the date of judgment. The Plaintiff, in its Affidavit in Support (enclosure 25) admitted that the Summons was filed out of time but the delay was not intentional. The Plaintiff averred that it is neither disinterested nor dilatory in exercise of its right to damages for trespass.

11. Counsel for the Plaintiff submitted the following and stated that the events clearly show that the Plaintiff is at all times interested to pursue its right and did not intentionally disregard the compliance of O. 37 r. 1(1) of the ROC:

> From the date of the Judgment of the High Court, the Plaintiff had resisted the 1st Defendant's application for stay of execution at the Court of Appeal.
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> The Plaintiff also successfully resisted the 1st Defendant's appeal against the High Court Judgment in May 2013.
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> The Plaintiff successfully resisted the 1st Defendant's leave to appeal to the Federal Court in October 2013.
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> Even in ordinary cases of enforcement or action in a judgment the limitation is 12 years as prescribed by Section 6(3) Limitation Act 1963.

...

14. I do not think that the Plaintiff's inadvertence or mere oversight is a cogent reason or reasonable excuse for the Plaintiff's failure to comply with the requirements of O. 37 r. 1(1) of the ROC. The statutory requirement file the Summons for Directions within 1 month from the date of the High Court Order on 9.11.2012 is mandatory, and not discretionary, as can be seen from the use of the word "shall" in O. 37 r. 1(1) ROC which, *inter alia*, provides that "the party entitled to the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions

...

21. It is also prejudicial to the 1st Defendant for the Plaintiff to revive its claim for assessment of damages on a date which is long past the one month which is mandated by law. There has to be finality to any time limit imposed by law so that there is certainty in the situation between both

A parties. It would be unfair to keep the 1st Defendant guessing whether the Plaintiff would suddenly enforce its rights under the High Court Order after the 1 month period.

[20] On a further observation, the High Court's decision was upheld by the Court of Appeal on 5 October 2016, yet the plaintiff failed, and/or neglected B and/or refused to file the NMA on/or before 5 November 2016 wherein there is another delay of 11 months. Again, the court cannot be expected to give leeway to strict compliance with the mandatory rules solely on the ground that the plaintiff is waiting for determination of some settlement.

[21] The plaintiff further argued that pursuant to O. 37 r. 1(3) of the Rules C of Court ("ROC") the delay in filing the NMA is not fatal to the assessment process as the court may on the application of the party against whom the judgment is given, proceed to assess damages or make such order as it thinks just. The plaintiff contends that the rule provides avenue for the unsuccessful party to proceed with the assessment proceedings in circumstances where a D delay in the assessment of proceedings may prejudice the unsuccessful party. According to the plaintiff, as the defendants being the unsuccessful party did not on their own accord initiate assessment proceedings, they ought to be estopped from raising the issue of delay against the plaintiff.

[22] This court is of the considered view that O. 37 r. 1(3) is independent E and not subject to r. 1(1). Order 37 r. 1(3) cannot negate the mandatory obligation of the plaintiff who is entitled to the benefit of the judgment to file the application for the assessment of damages within one month from the date of the judgment. Unlike O. 37 r. 1(1), the word "may" in O. 37 r. 1(3) does not make it mandatory for the court to assess the damages and on the F defendants against whom the judgment is given to make the application.

[23] Based on the enunciated decisions of the apex courts and the High court, the plaintiff's NMA runs contrary and in non-compliance to the mandatory provision of O. 37 r. 1 of the ROC. This court is of the considered view that the NMA filed by the plaintiff is an abuse of court's process and G premised on the delay issue alone, the plaintiff's NMA must be dismissed.

[24] Nevertheless, this court will embark on the issue of the plaintiff's claim for 24 months' salary. It is brought to the court's attention that the plaintiff was born on 20 November 1952 and was employed with the first defendant commencing from 1 January 2002. The plaintiff was H constructively dismissed pursuant to the letter by the first defendant dated 24 October 2011. Therefore, the plaintiff was 58 years 11 months and 4 days old when the constructive dismissal letter was given.

[25] It is highlighted to this court that the jurisdiction to award 24 months' I salary as damages is only vested in the Industrial Court wherein it is a remedy *in lieu* of reinstatement. By reference to the Second Schedule of the Industrial Relations Act 1967, it is stated that the court may award

24 months' salary as damages to the employee. Section 2 of the same Act further defines that "court" means Industrial Court. The definition is as follows:

> "Court" means the Industrial Court appointed under Part VII and includes, unless the contrary intention appears, any Court under section 22 constituted for the purpose of dealing with any trade dispute or matter referred to it, and any provision thereof;

[26] In *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238, the Federal Court through the judgment of Raja Azlan Shah CJ (Malaya) (as His Majesty then was) explained as to what the court and the Industrial Court can grant in the following fashion:

> In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, e.g., a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer. He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal, where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, *viz*., an award of damages. Further, the courts will not normally "reinstate" a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine v. National Dock Labour Board* [1957] AC 488, 500, 507; *Francis v. Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411; [1962] MLJ 407. At the most it will declare that it was wrongful. However his common law right has been profoundably affected in this country by the system of industrial awards enacted in the Industrial Relations Act, 1967. The wrongfully dismissed workman can now look to the remedies provided by the arbitration system. He can now look to the authorities or his union to prosecute the employer and force the latter to reinstate him. Reinstatement, a statutorily recognised form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law. The speedy and effective resolution of disputes or differences is clearly seen to be in the national interest, but it is also apparent that any attempt to impose a legal obligation without a prior exploration for a voluntary conciliation could aggravate rather than solve the problem. To this end the Director General is empowered by section 20 of the Act to offer assistance to the parties to the dispute to expedite a settlement by means of conciliatory meetings. The process is entirely voluntary and the Director General will not usually become involved unless the workman fulfills the internal procedure as laid down by the section which is: "he may, within one month of the dismissal, make

representations in writing to the Director General to be reinstated in his former employment." The word "may" in our view refers to the alternative remedy available to the wrongfully dismissed workmen to claim for reinstatement under our arbitration system. We say this because the-general common law considerations applicable to contracts of employment have been modified, in the area to which industrial awards are applicable, to the advantage of the workman in relation to wrongful dismissals where he could now ask to be reinstated in his former employment

[27] Upon reading the judgment in the above case and with the Industrial Relations Act 1967 enacted affecting all industrial awards, this court agrees with the submission of the defendants' learned counsel that the High Court has no jurisdiction to award 24 months of salary as damages.

[28] Further, reference must also be made to the retirement age at the private sector when the plaintiff tendered the constructive dismissal letter. The plaintiff tendered the said letter on 24 October 2012 prior to the enforcement of the Minimum Retirement Age Act 2012. The court's attention is brought to an article written by Dr Jashpal Kaur Bhat entitled "*Should Compensation In Lieu Of Reinstatement Be Denied On The Basis Of Age? Revisiting The Federal Court's Decision In Unilever (M) Holdings Sdn Bhd v. So Lai @ Soo Boon Lai & Anor* [2015] 3 CLJ 900; [2015] 2 ILR 265, where the position in regards to the retirement age prior to the Minimum Retirement Age Act 2012 is deliberated as follows:

Retirement And Pension Age In Malaysia

In respect of the Unilever decision, it must be noted that there was no mandatory or express retirement clause in the workman's employment contract. Since 2012, the Minimum Retirement Age Act 2012 ('MRAA') has set the minimum retirement age of private sector workers at 60 years. The MRAA has three immediate consequences on employers and workers in Malaysia:

(a) An employer cannot retire an employee earlier than 60 years.

(b) This minimum retirement age applies both to men and women.

(c) An employee may also continue in employment past the age of 60 years.

(d) An employee may choose to retire earlier than 60 years of age provided it has been agreed upon in the contract of service or collective agreement.

Prior to the MRAA, the retirement age for most Malaysian workers in the private sector was by way of practice and set by employers at 55 years, to reflect the mandatory retirement and pensionable age for public sector workers. Further retirement benefits available to private sector workers under the Employees Provident Fund or EPF, a superannuation fund which provides retirement payments to employees in the public and private

sectors, was also set at the age of 55 years. However, the government has now increased the mandatory retirement and pensionable age for public sector workers to 60 years. For now, the EPF retirement benefits maturity age remains at 55 years.

These new age limits affect the ability of older workers to seek work post-retirement and their ability to access their pension benefits.

The retirement age refers to the end of service or employment, while the pension age refers to the age at which pension benefits are payable. The current legislated minimum retirement age for private sector workers merely states the minimum age of retirement and not the maximum. The mandatory age of retirement for public sector workers merely ends their status as permanent employees in the civil service and it qualifies them to receive their pensions. Retired public sector workers may still continue to work on a contractual basis either in the public or private sector. Therefore, while the mandatory retirement age is also the pension age for public sector workers, it nonetheless does not prohibit them from working on a contractual basis.

According to the Ministry of Human Resources, the necessity for the MRRA legislation was largely due to concerns over the longer life spans, the onset of an ageing population by 2030 and a projected shortage of EPF savings. Thus, it is clear that the issue of the protection of and the disincentives for aged workers to work, has become an issue for the State and employers, particularly from a social justice approach.

(emphasis added)

[29] It is the plaintiff's argument that from a contractual point of view, his retirement age was never a consideration for his continued employment with the first defendant as he was still employed when he reached 55 years of age in 2007 and was only wrongfully terminated in 2011 when he had reached the age of 59.

[30] In deciding the issue whether in law, the award of compensation *in lieu* of reinstatement to an employee whose dismissal was held to be without just cause or excuse can be made when as at the date of the award, the employee had already reached or passed his compulsory retirement age, the Court of Appeal in *Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor* [2014] 8 CLJ 876 through the judgment of Raus Sharif PCA (as His Lordship then was) elaborated as follows:

[11] We accept the principle that in awarding compensation to an employee who is found to be dismissed without just cause, the Industrial Court must act according to equity, good conscience and substantial merit of the case as required under s. 30(5) of the IRA. But there must be a legal basis for the Industrial Court to award such compensation. The Federal Court in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109 speaking through Salleh Abas FJ (as he then was) at pp. 112-113 said:

> If there is a legal basis for paying compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under s. 30 of the Industrial Relation Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.
>
> [12] Applying the above principle to the facts of the instant case, we are of the view that there is no legal basis for the second respondent to be awarded compensation *in lieu* of reinstatement. The award of compensation *in lieu* of reinstatement assumes that the second respondent who had been dismissed has to be reinstated in his employment as at the date of the award. Obviously, the second respondent could not be reinstated or in a position to be reinstated when he was already as at the date of the award reached or passed the retirement age. Thus, the issue of paying the second respondent that compensation *in lieu* of reinstatement does not arise. Such compensation can only be ordered if at the date of the award he had not reached his age of retirement. But as stated earlier, the second respondent had well passed his retirement age. Thus, we adopt the view expressed by KC Vohrah J (as he then was) in the case of *Haji Md Ison Baba v. Swedish Motor Assemblies Sdn Bhd (supra)* wherein His Lordship held that compensation *in lieu* of re-instatement does not arise in cases where the employee has reached his retirement age.

[31] Later in the following year, the Federal Court in *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* [2015] 3 CLJ 900 agreed with the findings made by the Court of Appeal in *Sabah Forest Industries Sdn Bhd (supra)*. The Federal Court in that case found that the Industrial Court fell into error when it awarded compensation *in lieu* of reinstatement when clearly the respondent therein cannot be reinstated beyond his retirement age. The Federal Court held that the Industrial Court had no legal basis to award the compensation.

[32] It is true that the plaintiff's letter of confirmation & promotion dated 1 October 2002 herein does not specify the retirement age to be 55 years old and the plaintiff continued to be employed beyond the retirement age. However and evidently, the plaintiff has passed the retirement age when the constructive dismissal letter was tendered. It is of the considered view that as such, the plaintiff could not be gainsaid to have suffer any loss due to the constructive dismissal as he has passed the retirement age.

[33] Returning to the Federal Court's decision in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors*, it was stipulated that the only remedy that the plaintiff is entitled for constructive dismissal under common law is the payment to be made *in lieu* of notice. It is of the considered view that as an alternative to the compensation *in lieu* of the reinstatement, as the plaintiff herein is constructively dismissed, he may

claimed for his salary under his employment contract. In cl. 6 of the letter of confirmation & promotion to chief executive officer dated 1 October 20102 it is stated that:

> Notice of Termination
>
> During your probationary period, either party may serve 24 hours of notice of termination without assigning reasons. After confirmation, the termination notice period is thirty (30) days or one month salary *in lieu* of such notice is required.

[34] However, since the plaintiff's NMA runs contrary to O. 37 r. 1 of the ROC and the plaintiff failed to file the NMA within the mandated period of one month from the High Court's order, it is the finding of this court that the plaintiff had failed to assert and prove his legal right. The plaintiff has also failed to illustrate that he is entitled to the 24 months' salary given the fact that he has passed his retirement age. He does not suffer any loss due to the constructive dismissal, as he was still employed beyond his retirement age then.

[35] This court is bound by the *stare decisis* principle and when a point or principle of law has been officially decided and settled by the apex courts, notwithstanding any criticism towards such judgment, it will no longer open to examination or to a new ruling by the courts which are bound to follow such adjudication unless in exceptional cases. The plaintiff's case does not come within such exception.

Conclusion

[36] Premised on the above evaluation and findings, this court dismissed the plaintiff's NMA with costs.